Supreme Court, U.S.
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No. 97-1706

In The

Supreme Court of the United States

October Term, 1997

AMERICAN LIFE & CASUALTY INSURANCE COMPANY,

Petitioner,

v.

ANNE C. TROSTEL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF PARTIES AND CORPORATE AFFILIATES PURSUANT TO RULE 29.6

Norwest Bank Colorado, N.A. is a party respondent. Norwest Bank Colorado, N.A. serves as Trustee for one Robert Sears, one of the heirs of John Trostel. Norwest Bank Colorado, N.A. has no non-wholly owned subsidiaries. Its parent corporations are Norwest Corporation and Independent Bancorp of Arizona, Inc.

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STATEMENT OF THE CASE

In 1917, a real estate lease was entered into by John Trostel, as lessor, concerning a commercial building in Des Moines, Iowa. The term of the lease was ninety-nine years, and the lease contained a gold clause which provided that "[a]t the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." This clause was used, as was typical in that day, as a price-indexing mechanism to protect against the effects of inflation.

In 1933, Congress declared that gold clauses were unenforceable and against public policy and made such obligations payable in United States dollars. In 1977, Congress again acted by amending the underlying statute and reinstating the enforceability of gold clauses which were part of contracts issued after October 27, 1977. 31 U.S.C. § 5118(d)(2).

Petitioner in this action, American Life and Casualty Insurance Co. ("American Life") assumed all obligations of this lease by novation in 1990, and now opposes the enforcement of the gold clause by Respondents, the heirs of John Trostel. Payment to Respondents in gold coin was demanded in 1993. American Life has paid no rent since March 1, 1994.

The United States Court of Appeals for the Eighth Circuit found the gold clause at issue to be enforceable under the 1977 statutory amendment reinstating the enforceability of such clauses because the 1990 novation to American Life constituted a new contract, by which American Life had assumed all obligations of the original

1917 lease. *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), *vacated* 117 S. Ct. 939 (1997) (hereinafter *"Trostel I"*). Shortly thereafter in 1996, Congress amended the underlying statute by adding a provision to an otherwise unrelated act, which read in pertinent part:

> This paragraph does not apply to an obligation issued after October 27, 1977. **This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement.**

31 U.S.C. § 5118(d)(2) (1996 amendment emphasis added). The amendment also provided that it was not applicable to obligations "finally adjudicated" before the amendment's passage.

This Court then granted certiorari, vacated the decision of the Eighth Circuit, and remanded to the Eighth Circuit for further consideration in light of the 1996 amendment. 117 S. Ct. 939 (1997). Before the matter could be reconsidered by the Eighth Circuit, Congress again acted, affecting the outcome of this case once again. The legislation, enacted on October 10, 1997, provided that the language added in the 1996 amendment was stricken. Pub. L. No. 105-61, § 641. After considering the 1996 amendment and its 1997 repeal, the Eighth Circuit reinstated its previous decision. *Trostel v. American Life & Cas. Ins. Co.*, 133 F.3d 679, 681 (8th Cir. 1998) (hereinafter *"Trostel II"*). The Eighth Circuit concluded that the "gold clause" is enforceable under either amendment; that

under Iowa law, if the 1996 amendment remained applicable to this case, the parties had specifically agreed to include a gold clause by agreeing to be bound by "all the terms and conditions" of the original lease and that the 1997 repeal was retroactive. *Trostel II* at 681-82.

REASONS FOR DENYING THE WRIT

None of the reasons offered by American Life in its Petition for Writ of Certiorari satisfy this Court's standards for accepting a case for review. Rule 10 of this Court requires "compelling reasons" for granting certiorari, and this case presents none of the "compelling reasons" which deserve this Court's discretionary review. There is no split of legal authority on the issues presented in this case, pursuant to Rule 10(a), between any federal court of appeals and another federal court of appeals or state court of last resort. The compelling considerations of Rules 10(b) and (c) are not presented since the Eighth Circuit decided this case as a matter of Iowa state law. Therefore, no conflict between state courts of last resort is present and no important question of federal law was decided since the challenged retroactivity of the 1996 and 1997 amendments is not crucial to this Court's decision. For these reasons, American Life's writ should be DENIED.

I. THIS CASE INVOLVES QUESTIONS OF STATE CONTRACT LAW THAT PREDOMINATE OVER ANY FEDERAL ISSUES.

American Life again brings before this Court issues of state contract law interpretation that are preliminary to analysis of federal gold clause statutes. In *Trostel I*, the Eighth Circuit correctly applied Iowa contract law which provides that "a novation is a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty." *Klipp v. Iowa Grain Indemn. Fund. Bd.*, 502 N.W.2d 9, 11 (Iowa 1993) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 279 (1981)). All that is required for a novation is that the new obligor be bound to the terms of the original contract, that the old obligor be discharged from any obligation under the contract, and that the obligee assent to the substitution. *Id.* at 11-12; *see Andrew v. American Sav. Bank & Trust Co. of Davenport*, 258 N.W. 921 (Iowa 1935). Such an arrangement is commonly referred to as a "simple novation." RESTATEMENT (SECOND) OF CONTRACTS § 280 cmt. D (1981).

The Eighth Circuit correctly found that a novation occurred in this case and that American Life "specifically agreed to be bound by the obligations described in the 1917 lease and its written amendments." *Trostel I* at 742. The assignment obligated American Life to all terms of the original lease, and it released the assignor of the lease from any obligation under the lease. American Life argues that the Trostel heirs did not give their consent to the 1990 assignment, in spite of the fact that the contract itself provided such consent, and in fact the Trostel heirs had no contractual right to reject the 1990 assignment.

The Eighth Circuit correctly concluded that the lease always contained the gold clause, but that clause was merely unenforceable from 1933 until after 1977. The 1990 assignment did not create or add any additional terms or obligations that had not existed in the contract before, and American Life expressly accepted, assumed, and agreed to be bound by "all of the terms and conditions" of the original "terms and covenants on the part of the Lessee" under the existing lease.

American Life's complaint that it did not intend to accept a lease containing a gold clause is legally irrelevant and this argument has twice been rejected by the Eighth Circuit. Under Iowa law, American Life's intent in the contract is represented by the clear terms of its signed, written agreement, and not by its subsequent assertions of subjective intent. Both the assignor and American Life had the advice of sophisticated legal counsel in the arm's length assignment transaction. Iowa law clearly establishes that a party is bound by the documents he signs even though he has not read the agreement and is not aware of all its terms. *Weitz Co., Inc. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385 (8th Cir. 1983) (citation omitted).[1] Therefore, the specific intent of American Life's representatives to be bound by the gold clause is irrelevant and the plain language of the assignment contract is controlling.

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[1] *See also Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 99 (Iowa 1995), holding that "ignorance of the contents of a written agreement will not serve to negate or avoid its contents."

II. THE 1996 AND 1997 GOLD CLAUSE AMENDMENTS MAKE THIS GOLD CLAUSE ENFORCEABLE REGARDLESS OF WHETHER THEY ARE APPLIED RETROACTIVELY OR PROSPECTIVELY.

This Court need not consider whether the 1996 and 1997 amendments are retroactive since this case may be decided as a matter of Iowa state law. However, any analysis of the retroactivity of these amendments must conclude that the gold clause at issue is enforceable.

A. The 1997 Gold Clause Statute Amendment is Retroactive.

The Eighth Circuit correctly concluded that the 1997 amendment was retroactive although a decision regarding the retroactivity of the 1997 amendment was not necessary since the gold clause was enforceable as a matter of Iowa state law. American Life concludes incorrectly that the 1996 Amendment is retroactive and makes the gold clause at issue unenforceable, while the 1997 Amendment operates with no retroactive effect at all. American Life selectively applies only part of this Court's reasoning in *Landgraf v. U.S.I. Film Products* to reach this untenable result. 511 U.S. 240 (1994). In *Landgraf*, this Court established a two-tiered analysis to determine whether a statute should be applied retroactively. First, a court must examine the language of the statute to determine whether Congress has "expressly prescribed" retroactive effect of a law in cases arising before its enactment. *Id.* at 280. If such "clear congressional intent" is present, the court should follow Congress's plain directive and the inquiry is over. *Id.* However, if the court finds that

Congress gave no express indication of retroactive intent, it must then evaluate whether the statute would have true retroactive effect. *Id.* This effect, which would be inconsistent with policy objectives to provide "fair notice, reasonable reliance and settled expectations" to parties, might manifest itself by "impair[ing] rights a party had when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed." *Id.* at 270, 280. If such retroactive effect is present, the "judicial default rule" against retroactive application will be applied. *Id.* at 280. If no true retroactive effect is presented, a court should "apply the law in effect at the time [a court] renders its decision." *Id.*

The 1997 amendment which repealed the 1996 amendment was clearly intended to have a retroactive, *curative* effect. The 1997 repeal was signed just ten days and a year after the 1996 Amendment. No intervening decisions in this case, or any other, had been issued during that period.[2] The speedy repeal demonstrates that the 1997 repeal was not a response to intervening events or circumstances, but instead was intended to have a curative effect to the 1996 legislation which was passed in error. American Life brings attention to cases which demonstrate that issues of statutory retroactivity apply to repealing statutes, but fails to mention that these cases are quite distinguishable in their facts or are legally

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[2] This Court had merely instructed the Eighth Circuit to reconsider its opinion in light of the 1996 amendment and the Eighth Circuit has done that.

inoperable in this case under the conclusions reached by the courts in those cases.[3]

For example, in *Amoco Production Co. v. Fry*, the retroactivity of a repealing statute was not at issue, since the statute's effective date and express statements in its legislative history made it clear that only prospective application of the repealing statute was intended. *Amoco Production Co. v. Fry*, 118 F.3d 812, 816 (D.C. Cir. 1997). No such intent is evidenced in either the language or legislative history of the 1997 repealing amendment in this case. American Life points additionally to the dissenting opinion in *Salute v. Stratford Greens Garden*, but fails to consider that the majority of that court construed *Landgraf* principles to direct that "[w]hen an intervening repeal of a statute affects the propriety of prospective relief, a court should apply the law in effect at the time it renders its decision." *Salute v. Stratford Greens Garden*, 136 F.3d 293, 298 n.2 (2nd Cir. 1998).

Finally, American Life contends that the Eighth Circuit ignores prohibition of statutory construction based on reliance interests in retroactivity analysis under this Court's holding in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).[4] What American Life fails to recognize about

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[3] American Life cites the case of *United States v. Magnolia Petroleum Co.* in arguing that retroactivity of repealing statutes requires clear legislative intent, but this Court did not consider the effect of the repealing statute in that case nor examine its retroactivity. *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 163 (1928).

[4] To the contrary, the Eighth Circuit has demonstrated their familiarity with *Landgraf* analysis and statutory construction in

this case is that the civil rights legislation examined in *Rivers*, which was ultimately found to be prospective in nature and lacking in clear evidence of retroactive intent, was "responsive" legislation intended to expand the scope of civil rights statutes after several judicial opinions had narrowed their scope. *Id.* at 308. This legislation, which was also at issue in *Landgraf*, is thus distinctive in its purpose from the curative repeal at issue in this case. The 1997 repealing amendment was targeted to correct the erroneous 1996 amendment and did not intend to either expand or repair the gold clause statute's scope or respond to judicial decisions.[5] Accordingly, the retroactive intent of the 1997 amendment is evident, and the first tier of *Landgraf* analysis is satisfied.

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cases such as *Maitland v. Univ. of Minnesota*, 43 F.3d 357 (8th Cir. 1994) and *Davey v. Omaha*, 107 F.3d 587 (8th Cir. 1997). It should be noted that Circuit Judge Bowman participated as a panel member in both the *Maitland* and *Davey* cases, authored the *Maitland* opinion and was also a member of the panel who heard and decided *Trostel II* , finding retroactivity of the 1997 amendment.

[5] Indeed the curative nature of the legislation at issue is demonstrated in that the Eighth Circuit recognized that "[t]he sequence of legislative amendments and the involvement of these parties in that process are part of the full context of this case." *Trostel II* at 681. The Eighth Circuit indicated that retroactive language was not found in the 1997 amendment. This conclusion is logical since the amendment contains no language to indicate that it was intended to operate contrary to the fundamental purpose of a repealing statute – to curatively erase the 1996 amendment and its ill-considered effects. Accordingly, the Eighth Circuit properly concluded that the 1997 amendment was intended to "eliminat[e]" the 1996 amendment. *Id.*

Even if such retroactive intent was not evident, the statute has no "retroactive effect," so the presumption against retroactivity is not proper. The 1997 amendment, in contrast to the 1996 amendment as discussed *infra*, imposed no new duties with respect to the existing lease obligation. Indeed, the 1997 amendment restored the parties' duties to pre-1996 obligations that had existed since 1990, so "fair notice, reasonable reliance and settled expectations" are not endangered by application of this statute retroactively and no true retroactive effect is produced. Thus, under a complete *Landgraf* analysis, this Court should apply the law as it now exists, and the gold clause is thus enforceable.

B. The 1996 Gold Clause Statute Amendment is not Retroactive.

Assuming *arguendo* that state law is not controlling and that the 1997 repeal is not retroactive, the retroactive or prospective design of the 1996 amendment should be considered. If the 1996 Amendment is prospective by design or effect, then the version of the statute currently in effect (the 1997 amendment) controls the law in this case, and the gold clause is enforceable.

It is clear that the 1996 Amendment has a true retroactive effect because it imposes "new duties with respect to transactions already completed." *Landgraf* at 280. This Court noted in *Landgraf* that such a new burden is evidenced when the statute "attaches new legal consequences to events completed before its enactment." *Id.* at 270. Under American Life's theory, the 1996 Amendment does precisely that by erecting a new standard of assent

for the inclusion of gold clauses: the parties must "specifically agree" that the gold clause be part of an obligation already formed.

As to the other tier of *Landgraf* analysis, the language of the 1996 amendment reflects clear intent by its drafters that the amendment be applied prospectively, even if American Life did not. This Court should recognize three facets of the 1996 Amendment that demonstrate that Congress did not clearly indicate desire that the Amendment apply retroactively to negate the gold clause in this contract: *title, tense,* and *timing*. The title of the 1996 legislation was "**Prospective Application of Gold Clauses and Contracts**" which clearly indicates an intent to have the 1996 legislation be prospective. This title is not only evidence of the intent of the drafters of this amendment, but is also indicative of the intent of the Congresspersons who approved its inclusion in the "Economic Recovery and Paperwork Reduction Act of 1996," an enormous and otherwise unrelated piece of legislation. With respect to tense, the language of the 1996 legislation is also unambiguously prospective. The operative and most critical language of the 1996 amendment is hortatory and in the present and future tenses: "unless all parties to the assignment or novation specifically **agree**," – not "agree***d***." With respect to timing, the immediate and complete repeal of the 1996 legislation by Congress reveals that the 1996 legislation was an error. Thus, the title, tense, and timing of the 1996 amendment demonstrate that it is not clearly intended to be retroactive yet has a retroactive effect in application. The presumption against such retroactive effect applies, and the 1996 amendment should be applied prospectively only.

C. Even if the 1996 Amendment is Retroactive, and the 1997 Amendment is not Retroactive, the Gold Clause is Enforceable under the Language of the 1996 Amendment.

The pertinent provision of the 1996 Amendment provides that "any assignment or novation of [a valid gold clause] obligation after October 27, 1977" is not enforceable "unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609 (1996). Although the retroactive or prospective nature of the statute itself may raise an issue of federal concern, the issue of whether the parties "specifically agree[d] to include a gold clause" is a question of Iowa contract law and *not* a federal question. "As there exists no federal law of construction of contracts," *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990), for purposes of determining the parties' degree of assent, the 1996 Amendment impliedly adopts Iowa state law. Iowa state law establishes that incorporating contract terms by reference constitutes specific agreement to those terms so long as the reference is sufficiently explicit. *Kokjohn v. Harrington*, 531 N.W.2d 99, 101 (Iowa 1995). The Iowa Supreme Court in *Kokjohn* determined that "clear and specific" reference to an extrinsic document incorporates it into the referencing contract. *Id.* The 1990 Warranty Agreement's three explicit references to the terms of the 1917 contract are just such an incorporating reference.

American Life argues that the lack of its representatives' (who did not read the lease) specific intent to be

bound by the gold clause relieves American Life of liability under the 1996 Amendment. However, that assertion is contrary to Iowa law. *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 250 N.W.2d 317, 324 (Iowa 1977). In this case, it would be difficult to agree specifically to all of the individual terms of the original 1917 lease and its amendments other than by unambiguous reference to that 1917 lease, and this reference occurred three times in the 1990 Warranty Agreement. American Life is accordingly liable under the gold clause. Indeed, the Eighth Circuit correctly concluded that American Life "specifically agreed to be bound by the obligations described in the 1917 lease and its written amendments." *Trostel I* at 742.[6] Therefore, express agreement to the gold clause occurred in the 1990 novation, and under the 1996 Amendment, the gold clause is enforceable.

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[6] The Eighth Circuit also concluded that

> The language of the 1990 warranty agreement is not ambiguous. American Life agreed to be bound by the terms of the 1917 lease as recorded and as amended by the specific recorded instruments. The intent of American Life to be bound by these terms, which included an explicit gold clause, is expressed in clear and unambiguous language, and the contract thus should be enforced as written.

Trostel I at 743.

CONCLUSION

Petitioner has failed to present issues sufficient to invoke the jurisdiction of the Supreme Court of the United States. For that reason, and all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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